

Supreme Court, U. S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1976

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**No. 76-5344**

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**JAMES RAYMOND MOORE,**

Petitioner,

v.

**ILLINOIS,**

Respondent.

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**ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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**BRIEF FOR THE RESPONDENT**

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**BRIEF FOR THE RESPONDENT**

## STATUTORY AND CONSTITUTIONAL PROVISIONS

28 U.S.C. §2254(d):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia,

shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit —

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown

by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph number (8) that the record in the State court proceeding considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

### QUESTIONS PRESENTED

Whether the state courts' factual determination that there was an independent basis for the in-court identification is fairly supported by the record?

Whether under the totality of the circumstances, the courtroom identification was reliable even though the prior confrontation may have been suggestive?

Whether the failure to provide transcripts of the preliminary hearing to the petitioner for use at trial was harmless error?



### STATEMENT OF THE CASE

The Respondent relies upon the Petitioner's statement of the procedural history of the case, but elects to present a separate statement of facts in order to correct a number of inaccuracies and omissions contained in Petitioner's brief.

On December 14, 1967, at approximately 12:00 noon, Marilyn Miller was raped in her south side Chicago apartment. It was a bright sunny day when she lay down for a nap in her bedroom (R. 209-210, 305). She was fully clothed and asleep on her bed when she was awakened by an intruder standing in the doorway of the bedroom holding a knife (R. 210-211). She looked up and saw a large man whom she later described as a young Negro male over 6 feet tall, very powerful, dark complected and over 200 pounds in weight (R. 228).

The room was illuminated by multiple light sources. Light was coming in through one window of the bedroom, which was partially covered by a torn quilt or blanket, but not so much as to keep no light from entering. Light was also coming in through the second bedroom window, which was covered by a translucent gauze which "wouldn't keep out any light" (R. 304). Light was coming in through two doorways to the bedroom from the living-dining room of the apartment which was illuminated by bright sunlight (R. 304-306).

Marilyn Miller was "extremely alert" when she viewed her attacker as he entered the room (R. 311). She looked directly at him, observing his face and his body, his build and the way he was dressed for 10 to 15 seconds under the lighting conditions just described (R. 211-216). She never took her eyes off him during this time (R. 315).

He then proceeded to attack her. He partially undressed her, threatening her with the knife-like sharp object. He forced her to submit to oral copulation, raped her and then left (R. 214-223).

The assailant left behind a plastic folder resembling a check book or an address book which contained a letter belonging to a person not in any way connected with the victim (R. 223-225), but who was a former girl friend of James Moore (332-340).

Marilyn Miller then called the police. The first officer that arrived obtained a brief description of what had occurred and immediately transported her to Billings Hospital where she was examined. A vaginal smear and a sample taken from her underpants both revealed traces of human spermatozoa (R. 224-229, 373, 375).

Following the examination, Marilyn Miller was interviewed by two police detectives. She told them that the man who had raped her was the same man she had met the previous evening in a nearby restaurant. She had been approached by him and during a conversation he made a number of suggestive remarks which had offended her (R. 235-239).

On the day following the rape, Marilyn Miller viewed approximately 200 photographs from which she chose a number representing individuals of the same physical build as her attacker (R. 230-231). Several days later she was shown 9 to 12 more photos, all of which were male Negroes, several of whom were bearded, and she picked out one or two (R. 232). The defendant was chosen from the last group (R. 232). Miss Miller indicated to the detective that she thought he was the attacker but that she would like to see him in person.

On December 20, 1967, James R. Moore was arrested and he appeared in court the following day for setting bond. He was identified by Miss Miller during that proceeding, and this is the confrontation which is the subject of the current attack.

During examination of the victim by defense counsel at defendant's motion to suppress the pre-trial identification, the following colloquy on that identification took place:

Q. So it's when you came up and your name was called, did you realize that the person James Moore being brought out was the suspect you were supposed to identify?

A. I knew it was the man. I recognized him. (R. 97).  
and again on direct examination at trial:

Q. Did you know at the time, Marilyn, that he stepped out of that door, that he was James Moore?

A. I knew he was the man who raped me. (R. 234)  
and again on cross examination at trial:

Q. So when Mr. Moore was brought out here, you knew he was the man who they wanted you to look at, is that correct?

MR. TULLY: Objection.

THE COURT: Sustained.

MR. COHN: Did you think he was a stranger to the proceedings?

A. I knew who he was.

\* \* \*

Q. Did you believe he was a defendant?

A. I knew he was the man who raped me. (R. 284-285)

and again on redirect examination at trial:

Q. When you saw James Moore come out of that side door in Judge Ryan's chambers, (sic, courtroom) did you recognize him at the time?

A. Yes.

Q. Did you recognize him at that time as the man who raped you on the 14th of December, 1967?

A. Yes. I'd never forget his face.

Q. Are you sure that's the man?

A. I am positive. (R. 308).

## ARGUMENT

### I.

#### THE STATE COURTS' FACTUAL DETERMINATION THAT THERE WAS AN INDEPENDENT BASIS FOR THE IN-COURT IDENTIFICATION IS FAIRLY SUPPORTED BY THE RECORD.

In *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967), this Court held that a post-indictment lineup is a critical stage of a criminal prosecution and that the Sixth and Fourteenth Amendments require the presence of counsel at such a proceeding. That holding was extended in *Kirby v. Illinois*, 406 U.S. 682 (1972), to apply to confrontations occurring at or after the initiation of adversary judicial criminal proceedings. The confrontation in the case at bar occurred after the *Wade* decision, after criminal proceedings had begun and in the absence of an attorney representing the petitioner.<sup>1</sup> Therefore, the petitioner's Sixth Amendment right to counsel may have been violated — as has held each of the four state and federal courts that have considered this case.

The petitioner argues that a per se rule of exclusion

1. The record is somewhat unclear as to whether an adversary criminal proceeding had actually begun at the time James Moore was brought into court on December 21, 1967. This was only hours after his arrest and a complaint had not yet been filed. Marilyn Miller signed a complaint and it was filed at some point that morning, but there is no clear indication that it was prior to the proceeding. We hesitate to concede that this was a "critical stage" of the prosecution because the only accomplishments were the setting of bond and granting a continuance. Further, even if adversary criminal proceedings had begun it would be reasonable to allow the state some time to determine if the defendant was indigent and, if so, to appoint counsel. Despite those reservations, respondent will concede for purposes of this appeal that a *Wade-Gilbert* violation occurred at the proceeding.

applies or should be extended to this case. Under current law it does not apply. In *Wade*, the Court held that a per se exclusionary rule is only appropriately applied where the admissibility of evidence of the questioned confrontation itself is involved. Thus, the initial question is whether the evidence at the trial of this cause was "come at by exploitation of the primary illegality." In the case at bar it was not. Even though the December 21, 1967 confrontation was held without the presence of counsel, there was no later testimony at trial concerning the identification made at that time. Evidence of the confrontation was not later used to buttress Miss Miller's in-court identification.

Under these circumstances, previous holdings of this Court would indicate that a per se rule of exclusion would not apply. In *United States v. Wade, supra*, this Court specifically rejected extension of a per se rule of exclusion to this type of situation, saying:

"Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a per se rule of exclusion of courtroom identifications would be unjustified." 388 U.S. at 240.

Therefore, if previous pronouncements of this court are followed, the per se exclusionary rule does not apply here.

The next issue is not, as argued by petitioner, whether *United States v. Wade* was violated, but whether, if violated, it affected the fairness of the petitioner's trial. We strongly urge that it did not. In *Wade* this Court found a Sixth Amendment violation but did not reverse, saying:

"We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations



of the suspect other than the lineup identifications.” 388 U.S. at 240.

Thus, where the record shows by clear and convincing evidence that the in-court identification was based upon a source completely separate and apart from the questioned confrontation, the violation of Sixth Amendment rights cannot be said to have affected the verdict and no reversible error has occurred.

In this case, that specific issue was confronted by the courts from the outset. After a lengthy pretrial hearing on a motion to suppress the identification, the trial court initially noted that the requirements of *Wade* and *Gilbert* had been violated. The trial judge, in a lengthy and considered opinion, noted the evidence in detail, considered the applicable law, and specifically held that the in-court identification was not the product of the December 21, 1967 confrontation.

On direct appeal to the Illinois Supreme Court, the facts elicited at trial were reviewed in detail by that court. Considering a multitude of arguments, including that raised here, the court affirmed the conviction, specifically holding that:

“The record shows a sufficient basis for an identification wholly independent of the viewing of the photographs and her seeing the defendant in person at the preliminary hearing is shown to have merely confirmed her identification from the photograph.” *People v. Moore*, 51 Ill.2d 79, 281 N.E. 2d 294, 298 (1972).

The United States District Court for the Northern District of Illinois also decided the question. Considering petitioner’s habeas corpus petition below, the court reviewed the state court transcript of trial and pre-trial hearings and said:

“... [I]t is clear that the complaining witness’ iden-

tification of petitioner at trial had an origin independent of the suggestive proceeding on December 21.” p. 14.

Finally, the United States Court of Appeals for the Seventh Circuit considered the same question, reviewed the evidence and came to the same conclusion. Thus, the purely factual issue of whether there was an independent basis for Marilyn Miller’s in-court identification has thus far been decided in four courts. Petitioner now seeks to have that factual determination reviewed again.

This court and every federal court is restricted in the extent to which it can review this type of factual issue. Section 2254(d) of Title 28 of the United States Code compels a federal court to presume as correct any determination on the merits of a factual issue made by a state court after a hearing in proceedings to which the applicant for the writ and the state were parties, unless the federal court concludes that such determination is not fairly supported by the record. See *United States ex rel. Harris v. Illinois*, 457 F. 2d 191 (7th Cir. 1972). The finding of an independent basis for the identification in his case is such a factual determination of the merits made by two state courts with the same result. Each of the requirements set out in section 2254(d) are present in this case and therefore the presumption applies unless the record does not support the finding.

The record does fairly support the determination that Marilyn Miller’s in-court identification was based upon observations other than the December 21, 1967 confrontation. In making its determination the state court was required to consider those factors set out in *Wade* which would establish that the in-court identification was “come at . . . by means sufficiently distinguishable to be purged of the primary taint.” Those factors were considered by the state court. The facts considered were as follows:



On December 13, 1967, the night before the crime, the victim, Marilyn Miller, was approached in a restaurant near her apartment by James Raymond Moore. Moore had several minutes of conversation with Marilyn Miller the gist of which was that Miss Miller's love life was lacking and that he could make up for that lack. Miss Miller was offended by this conversation and the person who initiated it, James Raymond Moore (R. 115-119).

The next day at about noon, in bright sunny weather, an assailant entered Marilyn Miller's apartment and raped her. The room where the attack took place was well lighted. Light streamed in from two doors and two only partially covered windows (R. 304). Miss Miller got a good look at Moore for 10 to 15 seconds as he stood in the doorway with a knife in his hand and entered the room (R. 211-216). She was very alert and never took her eyes off him during this time (R. 311, 315). She was also able to observe all of him but that part of his face between the bridge of his nose and his chin at several other times during the course of the attack (R. 218) and at the time "she was no casual observer, but rather the potential victim of one of the most personally humiliating of all crimes."<sup>2</sup>

Afterwards and in the days that followed, Miss Miller was able to give fairly precise and accurate descriptions of her assailant (R. 150) contrary to what petitioner alleges in his brief. She described the prior meeting with the defendant to the police almost immediately after the rape (R. 155). She tentatively chose Moore's picture out of over 200 shown to her within the next several days, expressing only that she would like to see the individual in person before she could be positive (R. 155). Finally, her identifications at trial and during the motion to sup-

2. As quoted in *Neil v. Biggers*, 409 U.S. at 200.

press were so positive as to leave no doubt that the allegedly suggestive confrontation was not the basis of that identification (R. 97, 234, 284-285, 308).

This factual situation is clearly an adequate basis for the state court's finding. We call the court's attention to *Coleman v. Alabama*, 399 U.S. 1 (1970), where the witness caught a glimpse in the headlights of a passing car of the face of his assailant as he fled. This was held to be a sufficient independent origin. There are also a large number of Court of Appeals cases in which independent basis was found in factual situations as or less compelling than here. See *United States ex rel. Kirby v. Sturges*, 510 F. 2d 397 (7th Cir. 1975); *United States ex rel. Pierce v. Cannon*, 508 F. 2d 197 (7th Cir. 1974); *United States v. Pigg*, 471 F. 2d 843 (7th Cir. 1973); *United States ex rel. Harris v. Illinois*, *supra*; *United States v. Broadhead*, 413 F. 2d 1351 (7th Cir. 1969), *cert. denied*, 369 U.S. 1017; *United States v. Cox*, 428 F. 2d 683 (7th Cir. 1970), *cert. denied*, 400 U.S. 481; *United States ex rel. Frazier v. Henderson*, 464 F. 2d 260 (2d Cir. 1972); *United States ex rel. Phipps v. Follette*, 428 F. 2d 912 (2d Cir. 1970), *cert. denied*, 400 U.S. 908.

The finding of independent basis in this case is factually supported by the state court record and this court is therefore bound to presume its correctness.

## II.

**UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE COURTROOM IDENTIFICATION WAS RELIABLE EVEN THOUGH THE CONFRONTATION MAY HAVE BEEN SUGGESTIVE.**

Petitioner further argues that the confrontation occurring on December 21, 1967 was so unnecessarily suggestive

and conducive to irreparable mistaken identification that he was denied due process of law. Since each of the courts which has considered this case has concluded that the challenged confrontation was suggestive, we do not dispute that conclusion. Respondent does urge, however, that even though the confrontation may have been suggestive, it was the later courtroom identification that was reliable.

In *Stovall v. Denno*, 388 U.S. 293 (1967), this court indicated that the suggestiveness *vel non* of a confrontation was to be decided by a consideration of the "totality of the circumstances." Later decisions have indicated, however, that a finding of suggestiveness does not mechanically lead to exclusion of the in-court identification. In *Simmons v. United States*, 390 U.S. 377 (1968), it was indicated that application of the exclusionary rule depended upon a two-fold showing: First, that the confrontation was conducted utilizing impermissively suggestive procedures and, secondly that, as a result, there was a substantial likelihood of misidentification. Thus, where a suggestive confrontation had occurred, the later in-court identification need not be excluded where it could be ascertained that it had not affected the reliability of the later testimony of trial. Finally, in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), it was specifically stated that:

"[T]he central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. at 199.

In this case, Marilyn Miller's in-court trial identification was reliable even though the procedure used at the earlier confrontation may have been suggestive, and this conclusion is fairly supported by the record.

Upon a review of the record, the court will note a number of facts indicating reliability. Contrary to petitioner's

assertions, Miss Miller had an excellent opportunity to view her assailant at the time of the rape.

Although the complainant had been asleep in the bedroom of her apartment, she was awakened by a noise. She then had an opportunity to observe the intruder at close range for ten or fifteen seconds (R. 211-216). The time of the incident was approximately noon and, although there were coverings over the two windows in her room, a significant amount of sunlight filtered into the room from both windows and from the open doorways to adjoining rooms (R. 304-306). The complainant indicated that she was very alert at the time (R. 311). Complainant's positive identification of the petitioner as the intruder was bolstered by the fact that a man she identified as the petitioner had approached her in a bar the night before the incident and had spoken with her at close range for several minutes after approaching her (R. 235-239).

The complainant had given a description of her attacker prior to the suggestive confrontation which described the man as six feet to six feet-two inches, over 200 pounds, dark-complected, and having facial hair around his lips and chin (R. 228). The petitioner's description in the record was six feet-two inches, 240 pounds, and having a beard.

The complainant exhibited a high level of certainty during every corporeal identification of defendant. The only time she hesitated was during a photographic lineup when she picked out one or two photos out of approximately 200 photos shown to her but even then she did pick our petitioner's photo.

Seven days passed between the date of the crime and the date of the suggestive confrontation, but this was not an unduly long delay considering the circumstances surrounding her observations on the day of the crime. The



above facts indicate that the complainant's identification of petitioner at his trial was quite reliable and therefore the suggestive confrontation did not produce a substantial — or even remote — possibility of misidentification.

Section 2254(d) of Title 28 of the United States Code applies to this issue as it does the first. Examination of the record to determine whether this purely factual determination is fairly supported by the record reveals a satisfactory basis. Therefore, the findings of the State courts on this issue are presumptively correct.

### III.

#### **THE FAILURE TO PROVIDE TRANSCRIPTS OF THE PRELIMINARY HEARINGS TO THE PETITIONER FOR USE AT TRIAL WAS HARMLESS ERROR.**

Petitioner contends that the denial of preliminary hearing transcripts for use as impeachment at trial was a violation of his constitutional rights to equal protection of the laws, due process of law and the effective assistance of counsel. The State and Federal Courts considering this case have all held that the error was harmless beyond a reasonable doubt.

In *Roberts v. LaValle*, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 41 (1967), the Court reiterated the principle that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. There the rule was specifically applied to access to preliminary hearing transcripts under New York statutes. The Illinois Supreme Court, in this case below, held that under the authority of *Roberts*, the denial of the transcript denied Robert Moore equal protection of the laws. The court concluded, however, that this denial was harmless beyond a reasonable doubt under *Chapman v. California*, 368 U.S.

18 (1967) and *Schneble v. Florida*, 405 U.S. 427 (1972). In making the finding, the court said:

“We have examined the testimony at the trial, the testimony at the hearing on defendant's motion to suppress the identification of the defendant by the complaining witness, and the transcript of the preliminary hearing, and fail to find any testimony for which the transcript could have been used for purposes of impeachment. Defendant argues that in the hearing to suppress, and at trial, the complaining witness testified the assault occurred shortly after noon and that at the preliminary hearing she testified ‘it was night.’ Taken out of context that statement might appear to support defendant's contention that there is a discrepancy in her testimony, but read with her other testimony at the preliminary hearing it is obvious she meant her room was darkened because the windows were covered. We conclude that the denial of the transcript was harmless beyond a reasonable doubt.”  
281 N.E. 2d at 276.

That finding was sustained by both federal courts and is supported by the record. The defense attorney extensively cross-examined Miss Miller at the suppression hearing with regard to the pretrial confrontation. Every conceivable detail was brought out for the judge's consideration. The alleged false statement by the prosecutor in fact was not false but was given for purposes of bond upon the best information available to the State's Attorney. Knowledge of this statement could not have aided counsel in cross examination in view of the independent origin of the identification (see Section I of this Brief), the corroborative evidence and the certainty of Miss Miller's identification.

Since there were no discrepancies between the complaining witnesses testimony at the preliminary hearing, and since there was nothing in the bond hearing transcript which would have later assisted petitioner if he had been



in possession of a copy, failure to provide the transcript was harmless beyond a reasonable doubt.

This finding of harmless error was made both at the trial court level and by the Illinois Supreme Court by reviewing the preliminary hearing transcript and comparing it with the trial court record. Each of the Federal courts below affirmed this purely factual finding. We urge that the record fairly supports the conclusion and that the convictions should therefore be reversed.

### **CONCLUSION**

Each of the three issues presented to this Court were determined at the State court level by a finding of pure fact. Each was affirmed by the lower Federal courts based upon a review of those factual issues. A review of the record by this Court will lead to the conclusion that each of those factual determinations is fairly supported by the record and that the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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